In the

Supreme Court of the United States

JACOB J. PARKER and
STANLEY R. RESOR,
Appellants
vs
HOWARD B. LEVY

No. 73-206

Washington, D. C.
February 20, 1974

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v.	:	No. 73-206
HOWARD B. LEVY	:	

Washington, D. C.

Wednesday, February 20, 1974

The above-entitled matter came on for argument at 1:56 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice

APPEARANCES:

ROBERT H. BORK, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530
for the Appellant

CHARLES MORGAN, JR., ESQ., 410 First Street, S.E., Washington, D.C. 20003
for the Appellee

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-206, Parker versus Levy.

Mr. Solicitor General, you may proceed.

ORAL ARGUMENT OF ROBERT H. BORK,

SOLICITOR GENERAL OF THE UNITED STATES

ON BEHALF OF THE APPELLANT

MR. BORK: Mr. Chief Justice, and may it Please the Court:

This appeal, which is obviously similar in many respects to the case we have just heard, concerns, even more obviously, I think, the values I suggested were protected by Article 134 and here, Article 133 as well.

The conduct here is especially egregious and I think it is impossible for anybody to say that the Appellee here could not have known, must not have known what he was doing was prejudicial to good order and discipline, was not the standard of conduct expected of an officer and a gentleman and, indeed, of course, he was also convicted under Article 90 for the direct disobedience of the lawful order of a superior commissioned officer.

Upon conviction, Captain Levy was sentenced to dismissal from the Service, forfeiture of all pay and allowances and confinement for three years at hard labor.

Now, Article 90, as I say, provides for the

punishment of anyone subject to the Uniform Code of Military Justice who willfully disobeys a lawful command of a superior commissioned officer and the specification or charge levied against Captain Levy was that he willfully disobeyed a Colonel's command to establish and operate a Phase II training program for Special Forces AidMen in dermatology and the evidence showed that one of the functions of the hospital to which he was assigned, which was Fort Jackson, South Carolina -- he went there as soon as he was taken into the Service -- was to train Special Forces AidMen, who are men capable of giving certain levels of medical service in the field and Captain Levy was the chief of the dermatology service.

In fact, he was the only trained dermatologist at that hospital and he had the responsibility to conduct this training. For a time he did so, during early 1966 and then he did so with increasing irregularity and incompleteness.

Reports began to come in to the Colonel, Colonel Fancy, who commanded the hospital, that training was not being done adequately.

He investigated and discovered that Captain Levy had, by now, totally neglected his duties in training AidMen. [sic]
He called Colonel Levy before him and handed him a written order to conduct the training required.

Captain Levy read the order, announced that he

understood it and further announced that he would not obey it because of his medical ethics. He was told that obedience was, nonetheless, expected. He persisted in his refusal.

It is interesting, in a way, because his enlisted subordinates offered to carry out the training for him and he ordered them, using his rank as a captain, not to conduct the training of these Special Forces AidMen and threatened them with punishment if they disobeyed his order.

He, apparently, was determined that nobody was going to receive any training in dermatology in that hospital and he used his rank as an officer to carry out that determination.

He continued to persist over a period of a month or two to obey that order and, ultimately, disciplinary action in the form of an Article 90 charge was levied against him.

Now, Article 134 that we just heard, under which he was also charged, proscribes, among other things, as I said, all disorders and neglects to the prejudice of good order and discipline in the Armed Forces and all conduct of a nature to bring discredit upon the Armed Forces.

The specification -- and Article 133, as I've mentioned, is the -- provides punishment for conduct unbecoming an officer and a gentleman. The specification under Article 134 is set forth at pages 8 and 9 of our brief

and I shall merely mention some of the statements which he made to enlisted men under his command and to others apparently coming through the clinic.

The statements he made orally contained such sentences as "I would refuse to go to Vietnam if ordered to do so. I don't see why any colored soldier would go to Vietnam. They should refuse to go to Vietnam and, if sent, should refuse to fight. If I were a colored soldier, I would refuse to go to Vietnam and if I were a colored soldier, and I was sent, I would refuse to fight."

And then he referred, of course, to Special Forces personnel as liars, thieves, killers of peasants, murderers of women and children and so forth.

The specification of Article 133 is much the same. It involves the same -- allegations of the same remarks.

The evidence showed that during 1966, while he was on duty in the dermatology clinic, on many occasions Captain Levy made remarks of this nature. He engaged in conversations, many of them completely one-sided, with AidMen undergoing training, with patients and visitors. He did it in the open, in the presence of enlisted men, of civilian personnel and patients.

He was convicted under Articles 90, 133 and 134 and sentenced as I have said.

He exhausted his appeals in the military. Ultimately, after much litigation, he wound up with a petition for habeas corpus in the United States District Court for the middle district of Pennsylvania, which denied his petition but the Court of Appeals for the Third Circuit reversed, holding Articles 133 and 134 unconstitutionally vague.

It also held, with one judge, Chief Judge Seitz, dissenting, that the possibility of prejudice under Article 90 for the direct disobedience of a lawful order due to the fact that trial had been held under two articles held unconstitutional required that the Article 90 charge be overturned and sent back for a new trial.

We brought this case here on appeal.

At the outset, I should say that the Appellee's brief raises some 14 numbered points and many of these are, I suppose, offered as alternative grounds for affirmance but these were points not addressed or decided by the Court of Appeals for the Third Circuit and we suggest that the proper way to handle this would be that, should the Government prevail on its arguments on 133, 134 and 90, that the proper course would be to remand this case to the Court of Appeals for consideration of all these other points which it did not consider or decide and a decision on those issues.

So I will confine myself to the jurisdictional objections raised here and to the argument about the Articles themselves.

Captain Levy raises two jurisdictional objections. The first one is that this is not properly an appeal to the Supreme Court under 28 United States Code Section 1252.

I don't -- we've explained that in our brief. I don't think it requires extensive argument here. The Court noted that the jurisdictional question was deserved in noting probable jurisdiction.

1252 says that "Any party may appeal to the Supreme Court from an interlocutory or final judgment of any Court of the United States holding an Act of Congress unconstitutional."

And on its face, it provides for an appeal in this kind of a case, a court of appeals as any court, an Act of Congress has been held unconstitutional.

The revisor's notes indicate that this language was deliberately chosen to allow appeals from any federal court decision holding an Act of Congress invalid.

In addition to that, we rely upon the fact that Rule 44 of the Federal Rules of Appellate Procedure proscribes a mechanism for notifying the Attorney General of Constitutional questions arising in courts of appeals. The purpose is to allow the Attorney General to intervene if a Constitutional

question about a federal statute is raised so that he may, then, take an appeal from any decision against the Constitutionality of a federal statute.

So I think it is quite clear that we are properly here on an appeal. I think it is also quite clear that under 28 United States Code Section 2103 that if we are not properly here by way of appeal, this should be treated as a petition for certiorari, I mean, to go forward.

But there is one other or two other jurisdictional points raised by Appellee. The first one is that a Government attorney filed the notice of appeal in the Third Circuit Court of Appeals when that Government attorney was not an attorney of record in this case. I don't know why that is any objection to the filing of the notice of appeal.

This case was tried in the District Court in the Middle District of Pennsylvania. The Court of Appeals of the Third Circuit is in the Eastern District and the Department of Justice ordered the Assistant U.S. Attorney in the Eastern District to file a notice of appeal in the Third Circuit.

He was acting as an agent of the Government and I can't understand what is wrong with that filing of a notice of appeal. It seems to me to be an utterly frivolous objection.

The other objection is that the -- a person certifying the service of the notice of appeal -- the same man who filed it -- was not a member of the Bar of this Court.

Now, Rule 10 of this Court says that these appeals are to be filed in the Court of Appeals in the manner prescribed by Rule 33 of this Court -- to the manner prescribed.

The Court of Appeals covering the person who must certify rules seem to -- the Court of Appeals rules cover the person who must certify, so I take it that Rule 33's question as to persons does not apply to this case.

I don't think there is any jurisdictional question. I have really -- I merely discussed it because when it raised and the Court notes that it wants to hear about it, I felt an obligation to talk about it.

Unless there is further reason to discuss it, I'd sooner pass on to the merits.

We have here an Article 134 argument which is much the same as the argument in the Avrech case and I'd like to recapitulate just part of that, quite briefly.

As Mr. Justice White noted, it would be a little hard to attack this statute facially, given the fact that as to certain areas, there are deciding cases which say these things fall within 134. So it would be hard to strike it

down facially on those grounds.

I want to suggest, also, that the Letter Carriers case and Broadrick against Oklahoma certainly indicate that where the statute applies primarily to nonspeech activities, facial invalidation may not be called for -- is not called for.

Finally, not only are vagueness and overbreadth eliminated by the facts which we have already considered -- and I would suggest that it takes less than 30 days when one enters the military to perceive that one is in a new and different culture -- not only the limiting constructions, the context, the military function, all of which is obvious to anybody in it, indeed, the people outside it -- I want to repeat the fact which I think is crucial to this case and that is, it would be impossible to write a detailed code of conduct under 134 or the Article 133.

I have mentioned in the speech area the wide variety -- since we regulate all conduct in the military, unlike the civilian world, where it is possible to say, make a rifle shot statute and say you won't do that.

We regulate all conduct in the military world. We want affirmative action out of the military in a way that we don't out of the civilian population.

The military has a defined function. It has a goal. Civilian society has no single goal.

For that reason, we regulate everything towards a defined goal. The goal tells us what conduct violates the achievement of that goal. The fact that everything is regulated makes it impossible to write a detailed code.

We have to use words which men of common understanding can understand when they realize what kind of a society they are living in and what its object is.

And I suggest, again, that there are many areas of life other than the military where we have found it either impossible or not desirable to write a code.

We had, as I suggest, the Sherman Act. We have had some partial attempts to codify the Sherman Act and they either turn out to be Toolman on Anti-trust Law, which does not guide one to details, or they turn out to be the Robinson-Patmen Act and those codifications in themselves turn out to be enormously vague.

So I think we are dealing in an area where it is simply impossible to write the detailed code, the rifle shot series of statutes that would cover every aspect of allowable conduct in the military.

That being true, I think the kind of articles we have here are inevitable and desirable. It is --

Q How about, just on the speech side, Mr. Solicitor General, how much would the military lose if 134 was construed or held or redrafted with a proviso,

provided this will never apply to speech.

MR. BORK: Mr. Justice White, I think in that case the military would immediately have to draft.

Q Well, I understand that, but how much would you lose?

MR. BORK: A great deal. A great deal. One might not lose much in a conflict like World War II, although one might. I don't know. One certainly would --

Q You would have to then draft -- do the best you could in drafting kind of a detailed or a little bit more descriptive statute as to what speech was proscribed.

MR. BORK: Yes. Well, I , frankly, I have tried to think a little bit about what kind of an Article one would draft and I, frankly, think it is impossible. If it were possible for strong legal minds.

Q And, of course, you don't have to go that far here, do you?

MR. BORK: I beg your pardon?

Q You don't have to -- why do you have to meet this issue the way you are talking about? If it is so true as you say it is that this conduct so clearly violated, was core conduct within 134, is that the end of your case or not?

MR. BORK: I am trying now to --

Q Or do you feel you have to meet an over-breadth argument?

MR. BORK: I have to meet an overbreadth argument.

Q Well, you've already met it, you said.

MR. BORK: Perhaps I am, out of a desire to point out that there are a variety of reasons to point out why he can be met, I do wish to suggest that if over a period of generations --

Q Well, you must concede, though, Mr. Solicitor General, as you did in the Avrech case, that there would be a lot of conduct that would be charged under 134 that would be held not to be covered by it?

MR. BORK: Yes, I don't think that is very common.

Q Well, you've suggested some of those charges were not sustained.

MR. BORK: A number of them; I think about seven of the total were not sustained.

Q But, nevertheless, there are some that you could never imagine to be covered by 134.

MR. BORK: In that list?

Q Well, there will be a lot of conduct you wouldn't say is covered by 134.

MR. BORK: That I would say is not covered by 134, yes.

Q Or that anybody could suspect was covered

by it.

MR. BORK: That is quite correct. That is quite correct.

No, no, 134 clearly does not reach, as we are told by Appelles here, any conduct the military does not like. It clearly does not reach that.

Q No.

MR. BORK: It clearly, also, is not a catchall. It -- 134 expresses the rationale of military discipline and is confined to that. It has nothing to do with conduct somebody may not like or a catchall and so forth, but I, for reasons which I cannot quite articulate, I still wish to stress a point.

I mean, I cannot articulate the psychology that impels me to continue to try to stress this point.

[Laughter.]

But I think it is crucial to say that all this talk about oh, they could write specific articles that covered all these things is not true.

If this Court, over a period of generations, has struggled with what is "clear and present danger" and it is "the gravity of the offense discounted by its improbability" and so forth and that is the best that words can do -- and I suspect it is -- then I -- pardon me?

Q Didn't we get rid of that?

MR. BORK: Well, now we have incitement and other formulas, but I suggest that if one is going to cover much conduct, one is going to arrive at a form of worries which mean something to a man of common understanding but which you can play semantic games with and if you take it completely out of context, completely out of function, and completely out of the history of its use, yes, you can make it sound vague. I think that is what is being done here with 134.

Article 133 I think is really no different from Article 134 except that it has a faintly quaint ring to it. I think there is no doubt as to its meaning.

It applies, essentially, the same rationale as does Article 134 but I suppose it stresses the fact that officers are held to a higher level of conduct than are enlisted men, and properly so.

This Article refers to the proper standard of conduct of military officers and that, too, is not defined by any common civilian understanding of what is gentlemanly conduct. It refers to the conduct expected of an officer because of his military function and because misconduct by an officer is much more damaging to the military than individual misconduct by an enlisted man because he is the symbol and he is perceived by more people than is the enlisted man. When he misbehaves, a great many people see it.

Q Well, I suppose he is -- you can make the

argument that this may be valid even if the other one is not because the -- as against the argument that 134 applies to a lot of people who are basically unwilling civilians who have been drafted. That would not generally be true about officers, would it?

MR. BORK: It appears to be true with Captain Levy, Mr. Justice Stewart. He was a very unwilling civilian who was drafted.

Q He was drafted?

MR. BORK: He came in under the Berry Plan.

Q Oh, that's that plan, yes.

MR. BORK: He had his induction delayed so that he might complete his medical education and residency.

Q That's right.

MR. BORK: But I think --

Q It was a generality, I think --

MR. BORK: I beg your pardon?

Q I think as a generality, there are more officers there willingly than there are enlisted men.

MR. BORK: Oh, that's quite true. That's quite true. I don't think the reluctance of some of the enlisted men to be in the military has any bearing upon --

Q No, but the argument is made that these are basically unwilling civilians we are talking about, rather than professional soldiers.

MR. BORK: Yes, this is true.

Q And times have changed since the early 19th century when the Dynes case was decided.

MR. BORK: I think that is true. That may stress the additional need for Article 134, rather than to the contrary.

Q The historic roots of this 133 are -- go back to the British Articles of War of 1765 which provided for discharge from the Service which I would supposed could be arguably much more rational. Officers do presume, or at least in those days they did and, hopefully, they still do, know what is expected of them as officers and if they deviate from the conduct of an officer and a gentleman, they should no longer be officers.

But that is quite different from making it a criminal offense which it now is.

MR. BORK: I think the answer --

Q The historic roots were different. I mean, if you were on your -- even if you cheated at polo for your regimental team out in India, it might be conduct unbecoming an officer and you might be cashiered out of the regiment as an officer.

MR. BORK: That is quite true.

Q But to make that sort of thing a criminal offense, it's kind of -- I mean, this has come pretty far

from its roots, hasn't it?

MR. BORK: It has come pretty far from its roots, as --

Q It is now a criminal offense for which you could be sent to prison.

MR. BORK: That is quite true and I think that reflects the difference between the British and the American experience. As I say, the wording in the British experience probably meant that you would be cashiered from your regiment --

Q Umn hmn, drummed out of the regiment.

MR. BORK: If you mentioned a lady's name in the mess.

Q Exactly.

MR. BORK: As it comes into the American experience, it has -- and adopted by the Continental Congress which, I think, was not worried about cheating at polo or mentioning a lady's name in the mess, it has come to mean the conduct, the standard of behavior expected of an officer in light of the military function and context and in light of his greater duties.

Q And leadership responsibilities.

MR. BORK: And leadership responsibilities.

And I think that it has different historic roots, does not affect the fact that it has evolved into a

well-understood standard of conduct in the American context. Some of these statutes, I have been told, go back to Roman times. I don't think that makes them less valid.

Q Or worse, necessarily, yes.

You say that they, nowadays, at least, the 133 and 134 are basically the same except that 133 is applicable exclusively to officers. Is that right?

MR. BORK: Yes, I think that that is correct; 133, I might say, is typically -- not always, understand, but typically charged in connection with another Article.

Q 133 is?

MR. BORK: Yes.

Q Umn hmn. Now, in this case, you have Article 90 and Article 133 and 134 and I think I heard you say that, in this case, at least, the conduct thought to violate Article 133 was the same conduct that was thought to violate Article 134, don't you begin getting into double jeopardy problems, when you make two offenses out of one, to punish -- convict somebody twice for one act?

MR. BORK: I would doubt that in the ordinary case, Mr. Justice Stewart, but it wasn't true in this case because we had a single punishment for all three.

Q You typically do, don't you, in the military?

MR. BORK: Yes.

Q It's a compulsory joinder, I think, is't

there?

MR. BORK: Yes, but I don't --

Q Of all charges, even unrelated ones, isn't there?

MR. BORK: For trial. I am not -- I am not clear that there has to be a single punishment ordered, that they couldn't divide the punishments, but I am not clear about that and if I am wrong --

Q What was here?

MR. BORK: They had a single punishment for all charges.

Q Then that makes it even worse, you can't tell, can you?

MR. BORK: Well, I think the common rule, as we have cited in our brief, is that, if you are convicted under one valid charge and your sentence is less than the maximum for that charge, it is upheld even though the conviction under two other charges is overturned.

Q Well, sometimes it is.

Q But the Courts of Appeals, and as I read your brief, Mr. Solicitor General, you don't quarrel with it, held here that they wouldn't apply the general rule that if any one of the charges is sustained, then it is irrelevant that the other two may be upset if a single sentence has been imposed.

MR. BORK: Mr. Justice Brennan, I'm --

Q You do quarrel with it?

Q And may wind up here, in any case, "peculiarities associated with a sentence imposed by a military court, render this case appropriate for discretionary refusal to apply the clause in the general sentence rule."

Do you agree with that?

MR. BORK: No, your Honor, I certainly didn't intend to agree with that.

Q Well, I just wondered if you are right on Section 90, then why do we have to get into 133 and 134?

MR. BORK: Only because the -- well, you don't necessarily have to get into 133 and 134 if the Section 90 charge is upheld and the only challenge to it here -- I'm sorry, there are many challenges -- the only challenge in the Court of Appeals was that evidence that came in under the other charges might have prejudiced it.

Q But let's assume we sustained the Section 90 charges independently?

MR. BORK: Then, need this Court reach the 134 and 133 charges?

No, it need not.

Q Well, that is what you say you needn't, but the Court of Appeals said you had to even if the 90 charge was good.

Q Right.

MR. BORK: Well, that is because they reviewed -- the evidence, they think prejudices the 90 charge.

Q No.

Q No, he reverts to -- he would not follow the Clausson rule.

MR. BORK: I understand that. I understand that. I was trying to -- I was suggesting that we are not to follow that rule.

Q Well, what I am asking you, if we do sustain the 90 conviction, we are going to have to address what the Court of Appeals did in refusing, for that reason, not to reach the 133 and 134.

MR. BORK: You'll have to address the question of whether -- that's right, whether the rule applies.

Q That's right but have you briefed that?

MR. BORK: I think we did.

Q Yes, at the end of your brief.

Q If Judge Sietz had written the majority opinion in the Court of Appeals, he wouldn't have had to get to any Constitutional question, would he, if he had had another judge with him?

MR. BORK: That is right, he would not have.

Q Page 47 of your brief.

MR. BORK: If he had upheld the Article 90

conviction and the Clausson rule, he would not have had to reach 134 and 133.

On the other hand, unless there is a jurisdictional problem with the Avrech case, 134 is before the Court, anyway.

Q Mr. Solicitor General, if we were to send the case back, as has been suggested, on Article 90 in view of the joinder with 133 and 134, would it be appropriate for the Court of Appeals to reexamine only the sentence?

In other words, these three charges were tried together and there was only one sentence. As I understand the briefing in this case, there really isn't any dispute as to the failure to obey the order.

MR. BORK: There is not.

Q So if it there had been a trial only on 90, certain defenses were raised but they did not go to the issue of whether or not the order was disobeyed.

So my question is, whether, if the case were remanded to the Court of Appeals, there would have to be a further remand to a court-martial for retrial on the merits or whether you think only the sentence need be reexamined?

MR. BORK: The Court of Appeals, if one sent the Article 90 charge back, well, it depends -- if you upheld the 134 and 133 convictions, nothing would happen. If you struck those down --

Q No, let's assume we disagreed with the Government on 133 and 134.

MR. BORK: Then you would have to disagree with the Court of Appeals on the application of the Clausson rule, too, and tell the Court of Appeals -- well, if you agreed with the court in the application of the Clausson rule, the Article 90 charge would have to go back for retrial in a court-martial.

If you disagreed with the Court of Appeals over the Clausson rule, the Article 90 conviction could stand by itself.

Q Well, my question --

MR. BORK: And the sentence.

Q And the sentence?

MR. BORK: And the sentence.

Q Well, my difficulty, Mr. Solicitor General, is reading your brief at the top of 48. I don't see that you address the Carson question, rather you -- "We submit, however, that even if 133 and 134 were held unconstitutional," which means you want us to address the question of the constitutionality of 133 and 134, and my suggestion is that, if the Carson rule were applicable here and we were to sustain the Article 90 conviction, we don't have to reach the constitutionality of this example.

MR. BORK: I quite agree with that.

Q But we will have to say that the Court of Appeals was wrong in thinking this was the case in which it could exercise its discretion and refuse to apply the Carson rule.

MR. BORK: I agree with that.

I think I have sufficiently discussed the facial invalidation question in terms of the Letter Carriers case, the impossibility of drafting a code, the fact that 133, like 134, is given meaning by the military function and context and, indeed, here Captain Levy was warned with and argued with concerning his behavior and part of the 133 charge was that he not only disobeyed an order which was an Article 90 charge, but went back to the enlisted men and announced to them he had disobeyed an order and would not obey it, which was a 133 charge.

MR. CHIEF JUSTICE BURGER: Mr. Morgan.

ORAL ARGUMENT OF CHARLES MORGAN, JR., ESQ.,

ON BEHALF OF THE APPELLEE

MR. MORGAN: Mr. Chief Justice, and may it Please the Court:

I think first, we should go to the problem which developed in Orloft versus Willoughby, which is, as the Government noted there, the Supreme Court did, that the parties in this Court changed their position "as nimbly as if dancing a quadrille."

In this particular case and in light of the fact that we were just discussing the Article 90 charge, I think it is appropriate to go to the record in the case where the prosecutes states in the record that the "Order charge is directly related to and --" this is a quote -- "directly related to and intertwined with the factual bases for the other charges."

Now, what the prosecutor did in the trial was to take the additional two charges we had that were dismissed and he used those two charges, plus these two pure speech charges, and used those charges from the opening statement to the closing argument to demonstrate Levy's opposition to the war, which went to the question of intent and willfulness on the disobedience of the order.

It so limited the defense in the presentation of its case that the Court of Appeals considering that question and, incidentally, all questions relating to the order charge were submitted to the Court of Appeals and those were before the Court of Appeals, as they were before the District Court, and as we advised the Solicitor General in Motion to Dismiss or Affirm, they would be presented by us because they are implicit in his request that the conviction under Article 90 be affirmed.

Now, that is first.

Q Well, the place where you get convictions

under Article 90 affirmed or reversed is in the Court of Military Appeals. This is an habeas corpus giving a civil, a federal district court very, very limited jurisdiction, not to review the trial errors. This is purely a jurisdictional attack, isn't it?

This is not a matter of affirming or reversing an Article 90 conviction. That is the function of the Court of Military Appeals, isn't it?

MR. MORGAN: It is a question of affirming or reversing the Court of Appeals, of course.

Q Right, and this is a civil action. This is federal habeas corpus.

MR. MORGAN: Surely.

Q And a good deal of what is in your brief, I suggest, is just not open to a federal district court or a federal court of appeals under the system of military justice, as it has been developed in this country.

MR. MORGAN: Well, I suggest that it not only is, but it necessarily has to be. Let me give you an example.

Under the order charge at court-martial, Dr. Levy contended that the reason that he couldn't obey the order, and there is no evidence contrary to this, absolutely none, the Colonel said that Levy said, "I decline the order." What were the grounds? Ethical.

And Levy, a physician -- this isn't a fella just

standing in a dermatology clinic at Fort Jackson, South Carolina refusing to train medical personnel. He trained everybody. He trained doctors. He trained all medical personnel except one bunch and they were combat troops and he said he had an ethical right not to train them and the law officer wouldn't allow that as a defense and then we get to Whelchel versus McDonald, which divests them of jurisdiction and beyond that, Levy also says, he says, "I will not train special forces because, A) --" and I think we should go to Roe versus Wade and Doe versus Bolton and the abortion cases and I think --

Q Now, those aren't three cases. They are two, Roe against Wade and Doe against Bolton are the abortion cases.

MR. MORGAN: That's right. The abortion --

Q Not "And the abortion cases."

MR. MORGAN: The abortion cases with respect to the question of medical ethics because it appears to me from those cases that no one can be ordered, for instance, even though abortions are now legal and constitutional, no one can be ordered to perform an abortion and all Levy says, he comes into the Army, as the Solicitor General pointed out, under the doctors' draft. All doctors are drafted, 100 percent of them, almost, in the United States. They even waive, at this time, they even waive the physical requirements.

He has no previous military training.

The argument and the briefs which talk about previous military training are just out of the blue. I mean, he doesn't have any and the record clearly disclosed that.

He comes into the Service on July 13th, as I recall it -- or 9th. He gets to Fort Jackson. He is immediately put in charge of the dermatology clinic and that is where he stays. He is given 16 hours of military training at the outside on a Saturday morning and during that period of time, it may have gone to 26 hours, he almost shoots the sergeant teaching him how to shoot the pistol and beyond that, there is just absolutely no evidence of any notice or anything else, but here is Levy in the dermatology clinic.

And sent to him are people who he discovers over a period of time, are, as he states, "Killers of women and children, murderers of peasants."

Now, when he looks at Special Forces, he says, "I will not train combat troops. A) They are combat troops. I am a doctor and I'm bound by an oath to train only medical personnel," and he says, "B) They are using medicine for political and military purposes"and it is undisputed because the colonel who set up the program said, "That is exactly what they are doing." He thought it did more good than bad and throughout the record, that is the case.

Q Mr. Morgan, as a matter of curiosity, what

was his dermatological training that he had and, secondly, that he was to give these Aid people?

MR. MORGAN: He was a -- the dermatological training he had was that he had completed medical school, completed his residency. Under the Berry Plan, he then came into the service. He --

Q Period. That is all he had.

MR. MORGAN: He took his boards, I think, approximately a year after he got into the service.

Q Is he board-certified? Does the record show this?

MR. MORGAN: Yes. He board-certified just prior to the time or around the time of the order.

Q Did he ever practice dermatology?

MR. MORGAN: Privately? Not prior to his entry into the service.

Q And what was his supposed training in dermatology of these Aid people? Was it to cure people, or the opposite, as I think you have just inferred.

MR. MORGAN: Well, what I am saying is, his purpose was to train people to treat people. And what was he to train them to treat? Problems from impetigo to gonorrhea, syphilis, the bulk of the work in the clinic related to venereal disease.

There were 17,500 patient visits a year. Now,

of those patient visits, most of them, or the largest segment, related to venereal disease.

In that group of patients who came, there were two categories, service and nonservice dependents. That could be women, others.

Levy objected, and he had other additional medical grounds. Number 1, physician-patient privilege. He said, "I can't train these folks. I can't train them." He couldn't train the people without the Aidmen watching. This was applicatory training.

In other words, it wasn't teaching, you know, in the ordinary sense. It is doctors walking through with Special Forces Aid Men, a class of up to 10, as I recall the number, and they would stand and stare at the patients.

Now, in the records, I mean, there is one clear place where another physician from the city came in and was performing the training when Levy wasn't there and they had a Mrs. Helton, and Mrs. Helton --

Q Well, I am just examining his ethical posture. What you tell me about dermatologists being, in effect, syphilologists, this, of course, is routine, always has been --

MR. MORGAN: Yes, but --

Q But I am trying to find out what he found so unethical about treating natives or enlisted people or

officers to protect themselves against venereal disease or to effect cures once they have them.

MR. MORGAN: Right. Let me go to that.

First, I mentioned Mrs. Helton. I'll briefly cover that. Here is a woman patient who 10 people are supposed to watch and do go in and watch, troops, and she is just disturbed to death and they never even ask her consent. A lot of Levy's patients were women.

The second thing is, he was to train them in medical usages, where they were to be able to go into the field with certain kinds of diseases, not with a doctor over them, no medical supervision with an A team and Special Forces. They were to go out and carry drugs ranging from penicillin to chloromycedin and they were to go into the village, and the record is clear on this, as sort of a point man for the Aid team.

Their job was not to give the A team itself medical care, primarily, but to give it to the civilians who they recruited into civilian irregular defense groups of up to 1,500 persons and they were to provide them with medical care, but this was the entree point into the village.

What did they not do ethically? They could not maintain A) control over the patients. B) They could be ordered away by their nonmedical personnel. C) They had complete control and, as paramedics, did not work subject to

medical supervision in the field. D) They used medicine, according to the testimony of the man who devised the program himself, they used the medicine as the entree for a recruitment technique, primarily, in the villages and, lastly, it was undisputed that they were cross-trained, each of them, and were primarily combat soldiers, rather than medical personnel. Now --

Q Now, would he have regarded it as unethical violation of his Hippocratic Oath to treat one of these men --

MR. MORGAN: No.

Q -- who had some disease?

MR. MORGAN: No, nor did he consider it a violation of ethics for him to train them in first aid. All people, he said, you know, there was no question about that.

Treat as a physician, yes. Train in first aid, yes. But this was more advanced medical training.

Q He just didn't like what they were going to do to the training after they got it.

MR. MORGAN: Well, I think both. He knew that after they got the training they didn't work under medical supervision. There was some statement made about "sporadically trained" and that sort of thing.

This is a learning process that he is going through talking with Special Forces Aid Men, amongst others. He finally comes to taking these positions that he takes orally, never in a public speech, by the way, but only in the

clinic and as he did, he learned what they did and what they were doing with medicine and what they were trained to do.

You see, unlike Dr. Levy, who didn't go to Fort Sam Houston for military training, you know, when he got in the service, Special Forces started there, then the Aid Men came up and they came next to Fort Jackson, then from Fort Jackson they went to Fort Bragg, where, finally, they operated on a dog and then they went out in the field.

Now, Dr. Levy knew all that by the time he disobeyed the order and he knew that his ethical obligation was not to train other than medical personnel in medicine, that is, combat troops, and, secondly, not to train people who would misuse the medicine that they were given, to use it for political or the kind of purposes -- and that is pretty clear that that is an ethical concern.

The problem with the Army is, they don't recognize medical ethics including the privilege that physicians --

Q What specific part of the Hippocratic Oath is it that you rely on?

MR. MORGAN: The Hippocratic Oath? I think we set it forth at page 55 -- as I recall in my brief --

Q 55?

MR. MORGAN: I think so, your Honor.

Q I didn't mark it when I --

MR. MORGAN: Yes, page 55 and on 56 we set up a specific part:

"I swear that, according to my ability and judgment I will keep this stipulation, that by precept, lecture and every other mode of instruction, I will impart a knowledge of the art to disciples bound by stipulation of -- according to the law of medicine but to no others. Whatever I may see or hear in the lives of men -- abroad, I will not divulge as reckoning that all such should be kept secret."

And the very training, the nature of the training was that these fellas just walked into the clinic and stared down at his patients and watched him treat patients in the most personal situations and that included women.

Q Would you say, then, that paramedical people and their increasing use these days, is contrary to the Hippocratic Oath?

MR. MORGAN: No, the use of paramedical people is fine, as long as they are subject to medical supervision but these people were, A) not subject to medical supervision and B) didn't use paramedical treatment for paramedical purposes or for even a primary purpose. They used it for a combat, a military, a go out into the field and recruit people purpose.

Q Now, how do you get from this to the Constitution?

MR. MORGAN: How do I get from this to the Constitution? Easily, through Whelchel versus McDonald which said that if a -- and a defense is not allowed. In that case it was an insanity defense -- that that divests the court-martial of jurisdiction on that basis. Secondly, on First Amendment --

Q If you have a defense that the Constitution requires to be allowed --

MR. MORGAN: Oh, the First Amendment.

Q The First Amendment requires that he be permitted to present his objection to this use of paramedics before the court-martial.

MR. MORGAN: That he be allowed to present his ethical concern and reason for declining the order.

Now, first, Mr. Justice Rehnquist, he is brought into the Service after Orloft versus Willoughby as a physician. Since the 1800's, physicians can only be brought in as officers and A) since Orloft versus Willoughby, they can only be used in medical capacity.

Levy cannot be ordered to take a gun, shoot and do those kinds of things. He is not subject to that kind of concern. Now, what he says is, "I am entitled as a doctor to practice as a doctor and I am protected by the First Amendment," and I think he is, under Roe and under Doe.

I think we are getting to that, certainly, under

those two cases.

Now, I do want to mention that Dr. Levy was tried and convicted, as you well know, for conduct unbecoming an officer and a gentleman.

Now, there is no clear and present danger there. You don't have to show any damages there. All you do is -- and remember, these are pure speech charges. The conduct charge, the order charge is one thing. The rest of the charges are pure speech. He's not doing anything but talking, just talking.

And where is he talking? He is talking to the dermatology clinic. He is not like Howe, the case in the military decided after this, that said a man can be prosecuted under 133 for carrying a sign in a public demonstration.

He is in a private clinic. There are, at most, 13 people who have heard any one of the statements. In one conversation, four folks heard him.

Now, he is in private. All of the arguments about the Army and writing statutes and this sort of thing, that would be fine if the military was willing to give up what it has got. And what has it got?

It has got for its people the right to run for political office.

Now, when you turn -- when you start talking about statutes, I want to mention two things. First, if it is too

difficult to write, then it is too difficult for a serviceman to understand if it is not written and the second thing is, at Army Regulation 600-20, paragraph 42, it says that "Servicemen have a right to express their opinion privately and informally on all political subjects and candidates and to become candidates for public office."

Now, what the Army presently has -- Mr. Chief Justice Burger, you were asking about debating societies. It looks to me like under this Army regulation you can have folks in the same company going out and running against each other.

Now, I think if you are going to regulate speech, you got to -- you can't have your cake and eat it too, in the Army, and that is what they got now.

Q Now, as I follow his application of the Hippocratic Oath, he is taking the position as a doctor that it is better for the people out in the countryside to have no medical assistance at all than to have medical assistance of paramedical people that he would train.

Is that right? Is that about it?

MR. MORGAN: Not really. That is only a part of it and, of course, that is a medical question as far as whether it is better or worse, like if you gave everybody a penicillin shot, would the world be better off or not? And some doctors argue either way.

In this case, we brought forward the following witnesses: Jean Mayer, Dr. Sidel, Peter Bourne of the Army -- Walter Reed Institute of Research and they came forward, these physicians, and they said, this is an appropriate ethical concern.

They said, we recognize this and physicians who were in the Army said if they had Levy's factual knowledge, if what he knew was true, Dr. Maurer and others, they would not give training.

Now, the concern was not just as to how the treatment came in the field. For instance, Dr. Bourne came to a different conclusion on ethical concern. He thought it went the other way, you know, as far as he personally was concerned.

But the question was, may the physician, for a valid ethical concern, regardless -- as with most ethics, is it right or wrong is another question and Levy's position primarily was not that the people out in the field were worse off or better off with medicine. Levy's position was that they were military personnel using medicine for military and political purposes and that B) we'd never know whether they were better off with or without it and throughout the record, it is right interesting to go back and see what Special Forces have testified about the quality of medical care out there in the field.

They are saying they go in and they use words like ponucks, witch doctor and acupuncturists, doctors with needles.

Now, I am not so sure that those folks were worse off before they got there or better off. Now --

Q Well, the question really comes down to whether that is a judgment that subordinate officers in the military are free to make. Isn't that what this case comes to?

MR. MORGAN: As to whether doctors who are subordinate officers in the military are free to make, yes, and there is no question that you can't do that to a chaplain. There is no question that there is an attorney-client privilege in the military. But there is no physician-patient privilege recognized and doctors are different in, you know, the nature of the work is different.

Now, I want to mention this to you. As far as conduct unbecoming an officer or a gentleman is concerned, there was a case in 1827 in which a court-martial decided that the conduct of an admiral -- the first Jewish commodore, rather, in the Navy, Admiral Commodore Eureilly, they decided then that the conduct of a duel over honor was conduct unbecoming an officer but not that of a gentleman.

Now, I submit to you that even on the face of the statutes, if you take its words at fair meaning, conduct

unbecoming an officer can also be, sometimes, itself, conduct becoming a gentleman, and that the statute and its very words are mutually inconsistent and that in this case, for instance, that they charged Dr. Levy's conduct of not allowing Special Forces to walk in and stare at his women patients, that under that circumstance, lots of us would have considered the conduct would have been appropriate with respect to a gentleman, but not an officer.

With respect to 134 and 133, there is no question in this record but that Dr. Levy did not have the notice that the Appellant's case is based on. He came into the Service. He didn't get the training other Army doctors get. They didn't take him to Fort Sam Houston. They brought him in and they put him in the clinic.

Throughout the case, there was no -- there is not an iota of evidence that Levy knew what was prohibited or what wasn't prohibited under 133 or 134.

Now, beyond that, the Army regulation says that he may express his opinion"privately and informally on all political subjects and candidates and to become candidates for public office."

Where did he express his opinion? he did it in his office.

Now, what was Levy doing in his spare time? He didn't join the Officers' Club. That is in the record. He

went out and participated in voter registration campaigns and civil rights work in civilian clothes off post off base.

And we have been attempting, as civilian counsel, with a clearance for top secret in another military case, to get our hands on the very G-2 dossier that the Colonel testified he upgraded the charges after reading.

He based the upgrading of charges from an Article 15 to a general court-martial after he read the G-2 dossier. They gave us 80 pages. They gave our military counsel 180 pages and said he couldn't tell me what was in it.

And we know now because they wrote the district court that 25 pages came from nonArmy sources and they had the release on that and everything down the line but the very charges, Colonel Fancy testified, were based upon the G-2 dossier and his reading of it and he upgraded it on that basis.

Now, with respect to Broadrick and with respect to Letter Carriers, it seems to me that Levy complies completely with the requirements of that case and that this case is quite appropriate for judgment.

In Broadrick and in Letter Carriers, you have a statute which goes to political activity and, in effect, to political speech.

In this case, you have a statute which goes to everything and does so by its nature and because that is

what the Service wanted.

We can stand up here and talk about defining and doing this and that, but the very purpose for 133 and 134 is a catchall, a Catch-22.

They say that the purpose of it is to get all sorts of conduct. To talk about defining, that is not what the military wants with it. Not only does it not want -- it doesn't want to tell you about political speech, it wants to keept its political speech under its regulations and it wants to keep the right for its people to run for office.

Now, Letter Carriers didn't do that. Broadrick didn't do that and neither of those two cases say in the least anything which in any way inhibits the right of Dr. Levy to strike down these two statutes on behalf of himself, not on behalf of some conduct for someone else.

Now, I want to -- words are harsh that Dr. Levy used, not so harsh in retrospect as they were back then. He wasn't overseas at a military post. He hadn't been through, ever, basic training. He was at Fort Jackson, South Carolina in a dermatology clinic. He didn't want to be there but he was there and he was a good doctor. The record has not a question about that.

Q Where did he have his residency?

MR. MORGAN: At N.Y.U. and then in Bellevue, as I recall it. Or downstate, I -- I'm not quite sure what

the word means, but it is in New York City.

The prosecutor never took the position, we've all noticed, at the trial. If you'll go to page 2497 of the record, the prosecutor says, "Of course, the Government's position is like any law, the provisions of the Uniform Code are without specific notification binding on any individual in the military service."

It is only when we get here that the quadrille is danced.

Now, I -- the case presents many questions but the one thing that the case does not present is a doctor who refused to train medical personnel.

The one thing that the case does not present is a circumstance wherein a person was convicted, wherein a person was convicted for anything other than his political beliefs and beliefs that were thrust upon him and charged against him by Colonel Henry Franklin Fancy.

I have an extract in the record as to what disloyalty means and what disaffection means in the brief. Perhaps that will demonstrate appropriately the tremendous confusion that can occur with the use of words that nobody knows the meaning of.

But I know the meaning of a three-year sentence which he received and the meaning of that sentence was that these officers, with no standard for judgment and a prosecutor with no standard for judgment, and a Colonel who testified on

the basis of an undisclosed dossier, he was charging this fella with being disloyal, that they took those charges and catapulted them up and the only thing that was conduct unbecoming an officer or a gentleman in the entire case and the only discredit that came to the Service was the court-martial process and the fact that it occurred.

It seemed to me that the officer who testified, David Travis, at that time perhaps the most-decorated American in Vietnam, combat soldier, who said, "Sure, I've been at Fort Jackson --" he was black -- "and I've been with Dr. Levy and he's talked to me and I've disagreed with him." But he said, "That is what I am in Vietnam fighting for, is free expression."

And I asked him, "Where do you go from here?"

And he said, "Back to Vietnam."

I submit to you that that is really what this case is all about, the right of a person to express themselves freely in private, to practice medicine and to give the military their very best, even if they don't want to.

And maybe those problems will go away, now that we have come to the position that we don't have a drafted military service but a voluntary military service and, perhaps, I don't know, that will result in some military men, when they enter in the service, giving up some of those rights of civilians.

If it does and they are going to write a statute, they better get away from saying military men can run for office and discuss privately any political matters that come to their minds.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:52 o'clock p.m., the case was submitted.]